82-1222

No.

Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

PEOPLE OF THE STATE OF ILLINOIS, *et al.*,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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January, 1983

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QUESTION PRESENTED

Whether the Court of Appeals for the 7th Circuit properly rejected the standard used by the I.C.C. and by the Court of Appeals for the D.C. Circuit in determining whether to issue an interlocutory injunction pending review of a federal administrative agency action, and instead properly considered itself bound by a different standard.*

*Petitioners in the court of appeals are People of the State of Illinois, Illinois Commerce Commission, Bernard Sirotta Company, Inc., and Patrick W. Simmons. Mt. Pulaski Products, Inc. is an intervening petitioner. Respondents are Interstate Commerce Commission and United States of America. Intervening respondent is Illinois Central Gulf Railroad Company.

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IN THE

Supreme Court of the United States

October Term, 1982

No.

PEOPLE OF THE STATE OF ILLINOIS, *et al.*,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, People of the State of Illinois, Illinois Commerce Commission, Mt. Pulaski Products, Inc., Bernard Sirotta Company, Inc., and Patrick W. Simmons, pray that a writ of certiorari issue to review the order of the U.S. Court of Appeals for the Seventh Circuit, entered September 21, 1982, denying an interlocutory injunction in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals denying a stay (App. A, 1a-2a) is unreported, as are the opinions denying an interlocutory injunction (App. B, 3a-4a), and thereafter denying rehearing. (App. C, 5a-6a).

The opinion of the Interstate Commerce Commission (App. D, 7a-22a) is unreported. The decision of the In-

terstate Commerce Commission denying an administrative appeal (App. E, 23a-25a) is unreported, as is the Interstate Commerce Commission's decision denying a stay pending judicial review (App. F, 26a-29a).

JURISDICTION

The order of the Court of Appeals denying an interlocutory injunction (App. B, 3a-4a) was entered September 21, 1982. Petition for rehearing in banc was denied December 6, 1982 (App. C, 5a-6a).

The jurisdiction of the Supreme Court is confered by 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

The statutes primarily involved are 28 U.S.C. 10903(a), 28 U.S.C. 2349(b), and 5 U.S.C. 705.

49 U.S.C. 10903(a):

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may-
>
> (1) abandon any part of its railroad lines or
>
> (2) discontinue the operation of all rail transportation over any part of its railroad lines;
>
> only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or disconti-

nuance will have a serious, adverse impact on rural and community development.

28 U.S.C. 2349(b):

The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending hearing on the application for an interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, an identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. The hearing on an application for an in-

terlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application. On the final hearing of any proceeding to review an order under this chapter, the same requirements as to precedence and expedition apply.

5 U.S.C. 705:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

STATEMENT

This proceeding involves the standard which a reviewing court should employ in determining whether to issue an interlocutory injunction against the operation of an order of a federal administrative agency directly reviewable in the U.S. Courts of Appeals.

Illinois Central Gulf Railroad Company ("ICG") on December 21, 1981 applied to the I.C.C. for authority to abandon its 31.48-mile line of railroad between Clinton and New Holland, Illinois.[1] After instituting an investiga-

[1]Excluded from the abandonment proposal is a 1.72-mile segment at Lincoln, Illinois, (App. D, 7a).

tion into ICG's application, an I.C.C. employee board on June 4, 1982 granted ICG's application for abandonment. (App. D, 20a). This action was upheld by the I.C.C., which on July 2, 1982 concluded not to hear an appeal taken by objectors to the abandonment from the employee board's determination. (App. E, 24a).

The objectors to the abandonment thereupon filed for judicial review of the agency's determination in the U.S. Court of Appeals for the 7th Circuit. Those petitioning for review included People of the State of Illinois, Illinois Commerce Commission, two shippers,[2] and a representative of railway employees who would be affected by the abandonment.[3]

The I.C.C. was requested by the objectors to stay the abandonment pending judicial review. The I.C.C.'s Chairman on August 24, 1982 denied the request for stay of the abandonment, relying upon the standards established by the U.S. Court of Appeals for the District of Columbia Circuit in determining whether to stay agency action pending judicial review in *Washington Metropolitan Area, Etc. v. Holiday Tours,* 559 F. 2d 841 (D.C. Cir. 1977). App. F, 26a-29a).

The petitioners then requested the U.S. Court of appeals to issue a stay of the I.C.C.'s abandonment certificate. The court below denied a stay on August 30, 1982, on the ground it was not convinced the petitioners had made a sufficient showing under the standards set forth in *Adams v. Walker,* 488 F. 2d 1064 (7th Cir. 1973). The

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[2]Mt. Pulaski Products, Inc. and Bernard Sirotta Company, Inc.

[3]Patrick W. Simmons, Illinois Legislative Director for United Transportation Union.

railroad was permitted to discontinue service and abandon its line, but was barred from removing the tracks or from commencing sale pending further review. (App. A, 2a):

> We are unconvinced that petitioners have made a sufficient showing under *Adams v. Walker,* 488 F. 2d 1064 (7th Cir. 1973), to warrant an emergency stay of the certificate of abandonment pending judicial review of the ICC decision.
>
> IT IS ORDERED that the "EMERGENCY APPLICATION FOR STAY" is hereby DENIED. Illinois Central Gulf Railway Company (ICG) is permitted to discontinue service and abandon its line of railroad extending between Clinton, Illinois and New Holland, Illinois, with the exception of a 1.72-mile segment at Lincoln, after midnight, August 30, 1982. ICG is prohibited, however, from removing the tracks from the line of from commencing sale of the land pending review of the matter by this Court.

The U.S. Court of Appeals on September 21, 1982 next denied an interlocutory injunction, stating (App. B, 4a):

> IT IS ORDERED that the "Application for an Interlocutory Injunction" is hereby DENIED.

Petitioners requested rehearing in banc. The Court of Appeals construed the petition as a motion to reconsider en banc, and on December 6, 1982, affirmed its denial of an interlocutory injunction. (App. C, 5a-6a) The court below stated it was bound to follow its own decisional law with respect to requests for stays and preliminary injunctions, and that *Adams v. Walker* sets forth the test consistently applied to applications for stay. The court added that its standard for denying an interlocutory injunction is

set forth in *Ciechon v. City of Chicago,* 635 F. 2d 1055 (7th Cir. 1980) (App. C, 6a):

> Although we did not previously articulate our reasons for denying petitioners' "Application For An Interlocutory Injunction", we agree that *Ciechon v. City of Chicago,* 635 F. 2d 1055 (7th Cir. 1980) sets forth the appropriate standard for review. In *Ciechon,* we held that:
>
> > A preliminary injunction will not issue unless the movant establishes: (1) a reasonable likelihood of success on the merits; (2) irreparable injury and absence of an adequate remedy at law; (3) that the threatened harm to the plaintiff outweighs the harm the injunction may cause the defendant, and (4) that the granting of the injunction will not disservice the public interest. *Id.* at 1057.
>
> As implied in our previous order, we are unconvinced that movant has made the requisite showing for an "interlocutory injunction" in view of this Circuit's precedents.

REASONS FOR GRANTING THE WRIT

The Court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter.

The standard governing issuance of an interlocutory injunction pending judicial review of administrative action prevelant in the U.S. Court of Appeals for the District of Columbia Circuit is set forth in *Washington Metropolitan Area, Etc. v. Holiday Tours,* 559 F. 2d 841 (D.C. Cir. 1977). The key test is wheher a "serious legal question" is presented, in addition to the usual irreparable injury,

harm to others, and public interest considerations. 559 F. 2d at 844:

> "An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant."

The I.C.C. employs the "serious legal question" standard in determining whether the agency itself should stay its action pending judicial review, and specifically cited *Washington Metropolitan Area, Etc. v. Holiday Tours,* supra in the instant proceeding. (App. F, 26a).[4]

On the other hand, the Court of Appeals for the Seventh Circuit emphasizes "reasonable likelihood of success on the merits"(6a):

> "A preliminary injunction will not issue unless the movant establishes (1) reasonable likelihood of success on the merits; (2) irreparable injury and absence of an adequate remedy at law; (3) that the threatened harm to the plaintiff outweighs the harm the injunction may cause the defendant, and (4) that the granting of the injunction will not disserve the public interest."

The difference between the D.C. Circuit and the Seventh Circuit is important to the issuance of stays and interlocutory injunctions in judicial review of agency action under the Hobbs Act. 28 U.S.C. 2341, et seq.

---

[4]We do not imply the I.C.C.'s Chairman properly denied a stay under the *Washington Metropolitan Area,* standard. The agency routinely denies a stay in every judicial review of a railroad line abandonment case. We know of not a single stay granted by the I.C.C. pending judicial review of a line abandonment decision since 1980.

I. THE RESOLUTION OF THE QUESTION OF THE APPROPRIATE STANDARD FOR AN INTERLOCUTORY INJUNCTION IS IMPORTANT TO JUDICIAL REVIEW OF I.C.C. DECISIONS.

It is essential that there be a uniform national standard to govern stays and interlocutory injunctions in review of I.C.C. decisions. Actions of the Interstate Commerce Commission since 1975 are reviewed under the so-called Hobbs Act, in lieu of the three-judge district court procedure. 28 U.S.C. 2342(5).[5]

Venue under the Hobbs Act is in the judicial circuit in which the petitioner resides or has its principal office, or in the U.S. Court of Appeals for the District of Columbia Circuit. 28 U.S.C. 2343. Thus the Attorney General of Illinois may petition for review of an I.C.C. decision granting a line abandonment in Illinois in either the U.S. Court of Appeals for the Seventh Circuit, or in the U.S. Court of Appeals for the D.C. Circuit.

It is imperative for the orderly administration of justice that the standard for grant of an interlocutory injunction not depend upon the choice of forum.

II. THE STANDARD EMPLOYED BY THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT IS PREFERABLE TO THAT FOR THE SEVENTH CIRCUIT.

The *Washington Metropolitan Area, Etc.*, supra, standard employed by the U.S. Court of Appeals is preferable to the *Adams v. Walker,* 488 F. 2d 1064 (7th Cir. 1973) or *Ciechon v. City of Chicago,* 635 F. 2d 1055 (7th Cir. 1980) standard employed by the U.S. Court of Appeals for the Seventh Circuit. (App. A, 2a; App. C, 6a)

[5]P.L. 93-584 (January 2, 1975).

The I.C.C. uses the *Washington Metropolitan Area, Etc., supra,* standard although we urge it was misapplied by the agency in this proceeding. (App. F, 26a). The preponderance of the Circuits are believed to employ the *Washington Metropolitan Area, Etc., supra,* criteria. Moreover, the Seventh Circuit's *Adams v. Walker, supra,* criteria are based upon *Belcher v. Birmingham Trust National Bank,* 395 F. 2d 685, 686 (5th Cir. 1968), which in turn are expressly predicated upon *Virginia Petroleum Jobbers Association v. FPC,* 259 F. 2d 921, 925 (D.C. Cir. 1958).

The D.C. Circuit in 1977 modified its earlier *Virginia Petroleum Jobbers Association v. FPC, supra,* ruling, in its current *Washington Metropolitan Area, Etc.* standard. Thus the *Adams v. Walker* decision has been substantially undercut based upon its own rationale.

The Seventh Circuit's use of *Ciechon v. City of Chicago, supra,* is particularly inappropriate. The Court was reviewing a district court's preliminary injunction, rather than initially passing upon a matter directly reviewable in the U.S. Courts of Appeals, as are proceedings under the Hobbs Act to review federal administrative agencies. In short, a petition to review a decision by a federal administrative agency directly in the U.S. Court of Appeals, is markedly different from a determination whether a district court's preliminary injunction was properly issued.

The *Washington Metropolitan Area Etc.* standard is appropriate and should not have been rejected by the Court below in this proceeding.

III. THE MATTER IS OF SPECIAL IMPORTANCE BECAUSE THE DECISION TO PERMIT AN ABANDONMENT TO BECOME EFFECTIVE SERVES TO DENY EFFECTIVE JUDICIAL REVIEW OF THE MERITS.

The Court of Appeals has permitted the abandonment to become effective pending review of the validity of the agency determination, subject only to the preservation of roadbed and track structure. The discontinuance of all service over a line of railroad constitutes an "abandonment" even though the roadbed and tracks may not be immediately removed. ICG has cancelled its tariffs applicable to the Clinton-New Holland line and has no intention of resuming service unless ordered to do so. An abandonment "is characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line." *I.C.C. v. Chicago & N.W. Transp. Co.*, 533 F. 2d 1025, 1028 (8th Cir. 1976); *Chicago & N.W. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).[6]

The heretofore long-maintained policy of the I.C.C. to grant a stay in judicial review of abandonment cases was consistent with preservation of the right of effective judicial review.[7] The agency has recognized that abandonment is normally an irreversible action. *Southern Pacific Transp. Co. Abandonment*, 354 I.C.C. 752, 756 (1978):

> We are acutely aware that abandonment of a line is normally an irreversible action.

[6]For a compendium of citations, see: *I.C.C. v. Baltimore and Annapolis Railroad Company*, 398 F. Supp. 454, 462-63 (D. Md. 1975), aff'd 537 F.2d 77 (4th Cir. 1976), cert. den. 429 U.S. 859.

[7]There have been exceptions where the I.C.C. did not grant a stay, but such are believed to be few in number. See: *Tennessee Public Service Commission* v. *United States*, 275 F. Supp 87 (W.D. Tenn. 1967); *Whitehead Brothers Company* v. *United States*, 247 F. Supp. 614 (D. Mass. 1965)

The pledge to preserve the roadbed and tracks pending judicial review does not preserve the status quo. Indeed, Congress has recognized that abandonment of service should be subject to immediate injunctive action because of the adverse effect upon shippers and communities. *I.C.C. v. Maine Central R.R.*, 505 F.2d 590 (2d Cir. 1974); *I.C.C. v. Chicago, Rock Island and Pacific Railroad Co.*, 501 F.2d 908, 912-15 (8th Cir. 1974).

As a practical matter, the denial of a stay by a court of appeals in an abandonment case means that the petition for review will likely not be progressed to conclusion. This has been the actual result where stays have been denied. We are aware of only one proceeding in the Seventh Circuit,[8] and one pending in the Fifth Circuit,[9] that have gone to briefing after a stay was denied. The other cases have been voluntarily dismissed. Moreover, even if petitioners are successful in having a reviewing court remand an abandonment application to the I.C.C. with the line out of service, the virtual 100 percent approval of all abandonments by the agency makes such action futile. The line must be in service for petitioners to possess the will to continue with judicial review.

Further, petitioners would not be entitled to civil damages if they ultimately prevail in setting aside the railroad's exercise of the abandonment certificate. Injunctive relief is the sole remedy. *Powell v. United States*, 300 U.S. 276, 287-88 (1937); *Chicago & N.W. Tr. Co. v. Kalo, Brick & Tile Co., supra*, at 323 n.10. Finally, even the carrier's efforts to preserve the roadbed and track may not prevent the reverter of land. See: *Matter of Chicago, M. St. P. & P. R. Co.*, 654 F.2d 1218 (7th Cir. 1981).

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[8]Nos. 81-2520 and 81-2450, *People* v. I.C.C.

[9]No. 81-4291, *Fayette Enterprises* v. *I.C.C.*

The action of the I.C.C. and the Court of Appeals in permitting the abandonment to become effective pending judicial review is contrary to the statutory scheme that in the course of orderly procedure ther may be judicial review of I.C.C. orders. *Florida East Coast Ry. v. United States,* 228 F. Supp. 340 (M.D. Fla. 1964); *City of Williamsport v. United States,* 273 F. Supp. 899, 904 (M.D. Pa. 1967).

One of the grounds given by this Court in reversing the denial of an interlocutory injunction against consummation of the Penn-Central merger pending judicial review was that abandonments were contemplated. *B. & O. R. Co. v. United States,* 386 U.S. 372, 391 (1967):

> "This is blinking at reality. The fact is that traffic, trackage, terminals, etc., as well as financial and corporate structures can and will, beyond doubt, be quickly combined, changed abandoned, or consolidated."

Here also, the abandonment of the line pending judicial review serves to terminate judicial review as a practical matter.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted.

Respectfully submitted,

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January, 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 30, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,

No. 82-2235 vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents.

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Intervening Respondent.

Petition for Review of an Order of the Interstate Commerce Commission

This matter comes before the Court for its consideration upon the following documents:

1. The "EMERGENCY APPLICATION FOR STAY" filed herein on August 25, 1982, by counsel for the respondents.

2. The "PARTY-RESPONDENT'S RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY" filed herein on August 27, 1982.

3. The "REPLY OF RESPONDENT INTERSTATE COMMERCE COMMISSION TO EMERGENCY APPLICATION FOR STAY" filed herein on August 27, 1982.

We are unconvinced that petitioners have made a sufficient showing under *Adams v. Walker*, 488 F.2d 1064 (7th Cir. 1973), to warrant an emergency stay of the certificate of abandonment pending judicial review of the ICC decision.

IT IS ORDERED that the "EMERGENCY APPLICATION FOR STAY" is hereby DENIED. Illinois Central Gulf Railway Company (ICG) is permitted to discontinue service and abandon its line of railroad extending between Clinton, Illinois and New Holland, Illinois, with the exception of a 1.72-mile segment at Lincoln, after midnight, August 30, 1982. ICG is prohibited, however, from removing the tracks from the line or from commencing sale of the land pending review of the matter by this Court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September, 21, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

PEOPLE OF THE STATE OF
ILLINOIS, et al.,
Petitioners,

MT. PULASKI PRODUCTS, INC.,
Intervening Petitioner.

No. 82-2235 vs.

INTERSTATE COMMERCE
COMMISSION and UNITED
STATES OF AMERICA,
Respondents,

ILLINOIS CENTRAL GULF
RAILROAD COMPANY,
Intervening Respondent.

Petition for Review
of an Order of
the National
Labor Relations
Board

This matter comes before the Court for its consideration upon the following documents:

1. The "APPLICATION FOR AN INTERLOCUTORY INJUNCTION" filed herein on September 7, 1982, by counsel for the petitioners.

2. The "RESPONSE OF THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO PETITIONERS' MOTION FOR INTERLOCUTORY INJUNCTION" filed herein on September 14, 1982.

On consideration thereof,

IT IS ORDERED that the "Application for an Interlocutory Injunction" is hereby DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December, 6, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

No. 82-2235

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,

MT. PULASKI PRODUCTS, INC.,
Intervening Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents,

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Intervening Respondent.

Petition for Review of an Order of the Interstate Commerce Commission.

Petitioners' "PETITION FOR REHEARING IN BANC" filed on October 5, 1982, which we construe as a motion to reconsider en banc, is DENIED.

Petitioners have failed to raise any new arguments which would justify modifications of our orders of August 30, 1982, and September 21, 1982. This Court is bound to follow its own decisional law with respect to requests for stays and preliminary injunctions. *Adams v. Walker,* 488 F.2d 1064 (7th Cir. 1973) sets forth the test consistently applied by this Court to applications for stay, and that test has not been satisfied by petitioners.

Although we did not previously articulate our reasons for denying petitioners' "Application For An Interlocutory Injunction", we agree that *Ciechon v. City of Chicago,* 635 F.2d 1055 (7th Cir. 1980) sets forth the appropriate standard for review. In *Ciechon,* we held that:

> A preliminary injunction will not issue unless the movant establishes: (1) a reasonable likelihood of success on the merits; of success on the merits; (2) irreparable injury and absence of an adequate remedy at law; (3) that the threatened harm to the plaintiff outweighs the harm the injunction may cause the defendant, and (4) that the granting of the injunction will not disserve the public interest. *Id.* at 1057.

As implied in our previous order, we are unconvinced that that movant has made the requisite showing for an "interlocutory injunction" in view of this Circuit's precedents.

APPENDIX D

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-43 (Sub-No. 84)

ILLINOIS CENTRAL GULF RAILROAD COMPANY—ABANDONMENT—BETWEEN CLINTON AND LINCOLN, IL, AND BETWEEN LINCOLN AND NEW HOLLAND, IL

Decided: June 1, 1982

On December 21, 1981, Illinois Central Gulf Railroad Company (ICG) filed an application for authority to abandon that portion of its line of railroad which extends from Clinton (milepost 41.30) to Lincoln, IL (milepost 62.31) and from Lincoln (milepost 64.03) to New Holland, IL (milepost 74.50), a total distance of 31.48 miles (the Havana District line), located in DeWitt and Logan Counties, IL. For the reasons discussed below, we are granting the application.

By decision served March 2, 1982, an investigation into the proposed abandonment was instituted, and the matter was set for handling under the modified procedure.[1] Verified statements supplementing the originally filed application were filed by the applicant. Protests were filed by Hallsville Elevator Company, Mt. Pulaski Products, Inc.,

[1]This decision vacated the decision of the Director of the Office of Proceedings served February 2, 1982, which found that an investigation was unnecessary.

and Railway Labor Executives' Association. Verified statements in opposition to the abandonment proposal were filed jointly by the People of the State of Illinois, Illinois Commerce Commission, and Patrick W. Simmons (joint protestants) and separately by Bernard Sirotta Company, Inc. Applicant filed a rely.

PROCEDURAL MATTERS

ICG filed a motion to strike the protest filed by Railroad Labor Executives' Association, arguing that the protest does not provide the minimum information required for protests in the Commission's abandonment regulations. In its protest RLEA requests the Commission to deny the abandonment application, or, if the application is granted, to impose labor protective conditions.

With respect to the request that we deny the application, RLEA does not offer any reasons as to why we should take that course of action, and ICG is correct in its assertion that the protest does not meet the minimum informational requirements of 49 C.F.R. 1121.31. Therefore, ICG's motion to strike is granted, insofar as it concerns RLEA's request that the application be denied. However, under 49 U.S.C. 10903(b)(2) the Commission has a duty to protect the interests of rail employees in all abandonment proceedings by imposing labor protective conditions. Indeed, because of this duty the Commission's abandonment regulations permit employees or their representatives to file comments or protest, although they need not. *See* 49 C.F.R. 1121.36(b)(2). Therefore, the motion of ICG to strike the protest of RLEA is denied insofar as it would apply to the request that labor protective conditions be imposed.

Joint protestants move to strike various statements made by applicant's witnesses in the reply statement as hearsay, inaccurate, or new evidence. Joint protestants also request to cross examine the witness. Much of the motion consists of improper rebuttal and will not be considered. Joint protestants' motion to strike and for cross examination is denied. 49 C.F.R. 1121.36(d)(b).

TRAFFIC

ICG seeks to abandon this portion of the Havana District because its operations over the line segments have become unprofitable as a result of a decline in traffic volume over the past three years. The line is located in a predominately rural area and handles shipments consisting of farm products, food, and chemicals (fertilizer). The line generated the following traffic (in tons): 10,048 (1979); 7,382 (1980); and 3,862 (1981). The table below shows traffic movements in carloads by five major users in the past three years:

CARLOADS

	1979	1980	1981 (9 mos.)
Beason Farm Center	14	11	13
Logan County Farm Service	23	6	0
Growmark/Logan County Farm Service	22	12	15
Bernard Sirotta Company	18	10	19
Mt. Pulaski Products	59	31	0

TRACK CONDITION AND FUTURE MAINTENANCE

The line consists of 31.48 miles of branch line track and 2.64 miles of side track. The general condition of the line is poor. The normal timetable speed is 25 m.p.h.; however, 20.6 miles, or 65 percent of the line has been slow ordered to 10 m.p.h. speed since 1979.

The line is constructed with 0.01 miles of 136 lb. rail laid new in 1976; 0.01 miles of 115 lb. rail laid new in 1954; 11.84 miles of 112 lb. rail rolled between 1934 and 1946, and installed new and secondhand between 1945 and 1970; 13.24 miles of 110 lb. rail rolled between 1925 and 1933, and installed secondhand in 1955 and 1956; and 6.41 miles of 90 lb. rail rolled between 1918 and 1931, and installed secondhand between 1940 and 1955. Additionally, there are 2.64 miles of sidetrack consisting mostly of 85 lb. rail.

Ties are spaced on approximately 20 inch centers. Tie condition is fair to poor with many marginal ties reaching the end of their useful life. The ballast consists of chat with some gravel and is in fair condition from Clinton to Lincoln and in poor condition between Lincoln and New Holland.

ICG claims that it will have to spent $600,217 to rehabilitate the line to Federal Railroad Administration (FRA) Class I safety standards. It will require $186,504 in annual maintenance expenses after rehabilitation to continue to maintain the track at this level. The line has an estimated net salvage value of $947,228.

Protestants question the reliability of ICG's rehabilitation estimate based on the quality of rail on the line and the 10-mile per-hour operating speed along the line. However, the major rehabilitation items do not involve

rail replacement. They involve tie and timber replacement, bolt tightening, brush cutting, ballast and surfacing, and stabilizing roadbed. We are, therefore, accepting ICG's detailed rehabilitation figures. Protestants also disagree with ICG's estimate that the line is in generally poor condition, but do not substantiate their contention with any specific evidence to support their claim. Accordingly, in the absence of rebuttal by protestants, we agree with ICG's characterization of the line as being in fair to poor condition.

REVENUES AND EXPENSES

ICG's revenues from the line have steadily decreased. Total revenues were $96,960 in 1979; $74,548 in 1980; and $24,555 in 1981. The avoidable losses from the operations were $265,272 (1979); $237,356 (1980); and $247,332 (1981); ICG estimates that the line will continue to suffer operating losses and will lose $407,661 during the projected subsidy year.

ICG estimates that continued operation of the line will subject it to an annual opportunity cost of $175,143. Opportunity costs reflect the economic loss experienced by the carrier from foregoing a more profitable alternative use of its assets. Opportunity cost are computed by applying a rate of return (cost of capital), to the net liquidation value of the line. Net liquidation value consists of the sum of the fair market value of the real property on the line and the net salvage value of the track and structures. Applicant has submitted a real estate estimate of $822,638, and a net salvage value estimate of $894,453 ($947,228 salvage value decreased by $52,775, the revised expense of constructing a connecting track at Lincoln), resulting in a net liquidation value of $1,717,091.

ICG computes its opportunity costs by multiplying its net liquidation value of $1,717,091 by 10.2 percent cost of capital. This rate is based on the 9.3 percent cost of capital for the railroad industry used in *Texas and Pacific Railway Company-Abandonment,* 363 I.C.C. 666 (1980), and *Illinois Central Gulf R. Co - Abandonment,* 363 I.C.C. 729 (1980), adjusted for inflation. This adjusted rate of 10.2 percent has been accepted in several Commission proceedings and will be accepted here.[2]

Protestants assert that the application should be denied because ICG defined the Commission's "directive" concerning the submission of data regarding operations at Lincoln. The Commission's March 2, 1982 decision instituting in this proceeding contained no directive to submit information concerning the full scope of ICG's Lincoln operation. In any case ICG has shown that the Lincoln traffic studies to which protestants apparently refer are for non-branch traffic and bridge traffic. The Lincoln traffic originates or terminates on a portion of track which ICG will retain through Lincoln and move on its Peoria District line near Lincoln. Consequently, applicant need not have included the revenues or expenses for this traffic in its calculation of avoidable costs and losses.

Protestants question ICG's operating statements claiming that the avoidable losses are inflated because (1) switching revenue at Lincoln, IL should have been included in ICG's presentation, and (2) revenue from bridge traffic should have been presented. We are accepting ICG's statements as correct. The Lincoln switching revenue was

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[2]See, for example, Docket No. AB-1 (Sub-No. 111), *Chicago and North Western Transportation Company – Abandonment in Oneida, Villas, Iron, Ashland, and Bayfield Counties, WI, and Gogebic County, MI* (not printed), served July 10, 1981.

properly excluded because the Lincoln area trackage is not the subject of this application but was in issue in another abandonment [No. AB-43 (Sub-No. 58), *Illinois Central Gulf Railroad Company-Abandonment-Near New Holland and Havana, In Logan and Mason Counties, IL* (not printed), served April 21, 1981]. Future switching services will be provided by crews serving ICG's north-south Peoria District line through Lincoln. Future bridge traffic was also properly excluded because past bridge traffic was either associated with movements originating or terminating on another line which has recently been abandoned or represented special movements. Accordingly, we accept ICG's argument that its Lincoln traffic is properly excludable from the calculation of avoidable loss.

ALTERNATIVE SERVICE

Each station along the affected line has either alternate rail service available to it within close proximity or motor carrier service. The table below shows the stations on the line and the nearest rail service available to it:

Stations	**Rail Service**
Jenkins, IL	Clinton, IL (ICG) 4 miles
Hallsville, IL	Midland City, IL (N&W) 2 miles
Beason, IL	Midland City, IL (N&W) 3 miles
Skelton, IL	Lincoln, IL (ICG) 5 miles
Johnson Siding, IL	Lincoln, IL (ICG) 3 miles
Burton View, IL	Lincoln, IL (ICG) 7 miles
New Holland, IL	Luther, IL (CNW) 6 miles

Additionally, the following motor carriers serve the affected area: Advance Transportation Co., Container Carrier Corporation, Ryder Truck Lines, Inc., Chicago Express Co. Inc., McLean Trucking Co., and Smith Transfer Corporation.

SHIPPER AND COMMUNITY INTERESTS

Hallsville Elevator Company (Hallsville) opposes the abandonment. It is located approximately 7 miles west of Clinton on the subject line. While Hallsville admits that it has not used rail service for the past 2 years, it contends that whenever cars were ordered from ICG, none were received when they were needed. Shipper argues that if the tracks were improved and ICG's service became more responsive to customers' needs, it would tender traffic to the railroad. Presently, Hallsville has been using exempt motor carrier service to meet its transportation needs.

Mt. Pulaski Products, Inc. (Pulaski), has facilities located at Mt. Pulaski, IL, and another 2 miles west of Beason, IL. Both facilities are served by ICG. The shipping point for its Beason facility is Skelton, IL. Pulaski grinds corn cobs for use as an industrial polish-drying agent. The corn cobs are ground to various sizes and then shipped in bulk or in bags to various locations throughout the United States. The commodity is low-valued. Pulaski has recently slowed down its operations at the Skelton facility because of world-wide economic conditions resulting in lower demand for Pulaski's product. Pulaski affirms ICG's figures showing that Pulaski shipped 59 carloads from Skelton in 1979 and 31 carloads in 1980. No carloads moved in the first nine months of 1981. Pulaski also ships apricot pits originating in California for the account of the Bernard Sirotta Company (Sirotta), one of

the protestants in this proceeding. This product moves from Skelton to Brooklyn, NY.

Pulaski argues that the proposed abandonment would have a severe and dramatic adverse impact upon it. While it has another facility at Mt. Pulaski, it cannot transfer its Skelton operations to Mt. Pulaski because its operations there (even with the slow down in business) are at full capacity. Further, since the commodities involved are low-valued, it is not cost effective to handle shipments by more expensive motor carrier service. Pulaski is aware of motor carrier service which is available in the affected area, but believes that these carriers are not engaged in the movement of its commodities. In the absence of rail service, Pulaski will have to resort to private or independent, non-regulated carriers.

Sirotta also opposes the abandonment. Shipper is a producer of ground fruit pit shells which are used by different industries. The processing of these shells is performed by Pulaski at Skelton. The pit shells move inbound from California origins to Skelton in part over the ICG track in issue and move outbound to Sirotta's warehouse in Brooklyn.

Sirotta's inbound shipments over ICG's track were as follows in recent years: 7 carloads (408.9 tons) in 1980; 8 carloads (503.3 tons) in 1981; and 2 carloads (100 tons) in the first quarter of 1982. Outbound shipments were as follows: 3 carloads (150 tons) in 1980; 8 carloads (400 tons) in 1981; and 1 carload (50 tons) in 1982, first quarter. During this period, shipper used motor carrier service for outbound shipments on at least four occasions (20 tons). Trucks were used because of unusual demand for the product in Brooklyn that had to arrive overnight. Generally, Sirotta avoids motor carrier service because it is

more expensive than rail. Sirotta concludes that if the abandonment is granted, its transportation costs will be so high that the overall effect on its business will be "devastating."

No evidence was submitted concerning any adverse impact on rural and community development.

LABOR EXPENSES

ICG states that the average train crew size per trip on the line was 4.2 men in 1979, 4.0 men in 1980, and 4.1 men in the first 6 months of 1981. No important changes in train service have occurred during the last five years. For the last several years, the Havana District between Clinton and Havana, IL was served by a six day per-week road switcher that originated and terminated at Clinton. This train operated in turnaround service and could turn at any point between Clinton and Havana as service needs required. Following abandonment of the track between New Holland and Havana [Docket No. AB-43 (Sub-No. 58), *supra*] this job assignment was changed to operate between Clinton and New Holland and return Monday through Saturday.

Protestants argue that certain labor expenses would be unavoidable after abandonment (not shown by ICG's operating statements) because of the "tabulated local rule". However, we do not accept protestants' argument concerning the unavoidability of labor costs due to the tabulated local rule. In Docket No. AB-43 (Sub-No. 74F), *Illinois Central Gulf Railroad Company-Abandonment -In Henderson, Union, Webster, Crittenden and Caldwell Counties, KY.* (not printed), served March 1, 1982, the Commission had occasion to deal with the issue of the

avoidability of such costs. In that decision the Commission stated that even under the tabulated local rule, the members of the crew will at some point in time accept reassignment, retire, or eventually die thereby ending the carrier's financial obligation. When that obligation ends the carrier will begin to realize the full benefits of the abandonment. These expenses may realistically be expected to end at a point in time after which the carrier will achieve an economic benefit from the abandonment. This being the case, crew wages covered by a tabulated local rule were found to be avoidable within the meaning of the statute and the Commission's regulations. In accordance with the reasoning in that decision we similarily find crew wages under a tabulated local rule to be avoidable here.

Protestants also argue that enginemen's wages would not be avoidable after abandonment. ICG has several options after abandonment regarding firemen. It could furlough a fireman. Even if a fireman were not furloughed, at some point ICG would not need to hire a new fireman that it would otherwise have to hire. The expenses of a fireman under these circumstances also are avoidable.

ICG'S OVERALL FINANCIAL CONDITION

Protestants charge that, contrary to general allegations made by a witness for ICG, it is not a financially troubled railroad. In support, protestants submit an article from *Railway Age,* November 29, 1979, where the Chairman of IC Industries (the parent of ICG) criticizes alleged "public relations efforts" to portray ICG as a "financially troubled" railroad. Protestants also submit an exhibit from IC's 1981 Annual Report, showing that, overall, ICG's profits have increased since 1975.

The financial condition of IC Industries is not in issue in this proceeding. ICG's overall earnings have no relevance to the issues in this proceeding where the uncontroverted evidence shows that ICG is losing revenues on the line proposed for abandonment.

DISCUSSION AND CONCLUSIONS

The statutory standard governing abandonments is whether the present or future public convenience and necessity permit the proposed abandonment. 49 U.S.C. 10903(a). In implementing this standard, we must strike a balance between the potential harm to affected shippers and communities which would result from abandonment and the present and future burden which continued operations would impose on the carrier and on interstate commerce. *Colorado v. United States,* 271 U.S. 153 (1926).

It is undisputed that the line at issue has been losing revenues in the past years because of significantly declining traffic. ICG's operations have resulted in losses of $265,272 (1979); $237,356 (1980), and $247,332 (1981). ICG estimates that it will lose $407,661 during the projected subsidy year. In addition, the line is in poor condition. ICG will have to spend approximately $600,000 to rehabilitate it to FRA Class I safety standards. It will require $185,504 in annual maintenance to continue to maintain the track at this level. Further, continued operation of the line will subject applicant to an annual opportunity cost of $175,143. In sum, continuing operations over the line would be a burden on ICG and on interstate commerce.

Protestants, on the other hand, have not demonstrated that abandonment would have a significant adverse affect on them. Two protestants, Mt. Pulaski and

Hallsville, claim that they would offer more traffic to ICG if business conditions or rail service on the line improve. Neither protestant, however, has presented a projection of such future traffic. Unsupported allegations of a projection of such future traffic. Unsupported allegations of future traffic are entitled to little weight. Without greater specificity, we cannot find that the future use of the line will differ markedly from the past. Further, the record reveals the availability of alternative transportation services in the area. All ICG stations on the line are located within approximately 7 miles of alternative rail facilities and several motor carriers are authorized to serve the area. A highway system (Illinois Highway 10) is in place. In fact, one protestant, Sirotta, has used motor carrier service on at least four occasions from 1981 to 1982. While all three protestants claim general adverse effects resulting from the abandonment, none has provided specific data in support. We can accord little weight to these allegations.

We conclude, therefore, that the burden to ICG and interstate commerce from continued operation of the line outweighs the adverse effects of the abandonment.

ENVIRONMENTAL ISSUES

The environmental and energy impacts of the proposed abandonment were examined by the Commission's Section of Energy and Environment and found not to be significant. Accordingly, the [sic] conclude that abandonment will not have a significant impact on the local environment, and that the right-of-way is not suitable for alternative public use following abandonment.

LABOR PROTECTION

In approving this abandonment we must ensure that affected rail employees are adequately protected. 49 U.S.C. 10903(b)(2). Generally, we require that the protections afforded in *Oregon Short Line R. Co. - Abandonment - Goshen,* 360 I.C.C. 91 (1979) (*Oregon III*) be imposed. In this proceeding, RLEA has requested modification of the *Oregon III* conditions. Because the record contains no evidence of harm to employees not sufficiently mitigated by the standard conditions, this abandonment will be approved subject to the *Oregon III* conditions.

We find:

The present and future public convenience and necessity permit the abandonment by ICG of its line of railroad extending between Clinton (milepost 41.30) and Lincoln, IL (milepost 62.31) and between Lincoln (milepost 64.3) and New Holland, IL (milepost 74.50), subject to the employee protection conditions in *Oregon Short Line R. Co. -Abandonment - Goshen,* 360 I.C.C. 91 (1979).

This action does not significantly affect the quality of the human environment or conservation of energy resources.

It is ordered:

1. The motion to strike the protest of Railway Labor Executives' Association is granted insofar as it applies to the RLEA request that the abandonment application be denied; in all other respects the motion is denied.

2. The motion of protestants to strike various statements mode by applicants [sic] witnesses in its reply statement and for cross examination is denied.

3. Our findings will be published in the *Federal Register* concurrently with the service of this decision. If any person or governmental entity is considering an offer of financial assistance or an offer to purchase the line to enable rail service to be continued, it must tender such offer to the carrier within 10 days following publication. The offer must be filed concurrently with the Commission, and the offeror must also comply with 49 U.S.C. 10905, as amended by section 402(c) of the Staggers Rail Act of 1980, and with 49 CFR 1121.38(b), as amended by Ex Parte No. 274 (Sub-No. 6), *Abandonment of R. Lines & Discontinuance of Serv.*, 365 I.C.C. 249 (1981).

4. All correspondence to the Commission with respect to offers of financial assistance for the continued operation or acquisition of this line shall contain an appropriate reference to this proceeding, and the following notation shall be typed in boldface on the lower left-hand corner of envelopes containing such correspondence: "Section of Finance, AB-RSCP".

5. Subject to the conditions set forth above and provided no offer for continued rail operations is received, an appropriate certificate of abandonment shall be issued. Illinois Central Gulf Railroad Company shall not effect abandonment prior to the effective date of the certificate.

6. If abandonment is effected, tariffs applicable to this line may be canceled upon not less than 10 days' notice to this Commission. When filing schedules canceling tariffs applicable to the line, applicant shall refer to the certificate by date and docket number.

7. If the authority granted by this decision is exercised applicant shall advise this Commission in writing, im-

mediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

8. If the authority granted in this decision is not exercised within one year from its effective date, it shall be of no further effect.

9. This decision shall be effective 30 days from the date it is served.

By the Commission, Review Board Number 2, Members Carleton, Fisher, and Williams.

Agatha L. Mergenovich
Secretary

(SEAL)

APPENDIX E

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-43 (Sub-No. 84)

ILLINOIS CENTRAL GULF RAILROAD COMPANY—ABANDONMENT—BETWEEN CLINTON AND LINCOLN, IL, AND BETWEEN LINCOLN AND NEW HOLLAND, IL

Decided: June 30, 1982

By decision served June 4, 1982, the Commission, Review Board Number 2, granted the application of Illinois Central Gulf Railroad Company (ICG) for authority to abandon 31.48 miles of rail line in DeWitt and Logan Counties, IL.

On June 24, 1982, the People of the State of Illinois (represented by the State Attorney General),[1] Illinois Commerce Commission, Bernard Sirotta Company, Inc., and Patrick W. Simmons (Illinois Legislative Director for the United Transportation Union) (appellants) filed a joint appeal to the review board's decision alleging material error and that the action involves a matter of general transportation importance.

Appellants maintain that applicant's filing is flawed because it failed to furnish revenue and cost data on its operations at Lincoln, IL. They argue that the review

[1]The State Attorney General is also representing two specific protestants, Hallsville Elevator Company and Mt. Pulaski Products, Inc.

board erred in failing to take into consideration the overall financial condition of applicant and its parent IC Industries; failing to grant appellants' motions to strike; finding certain crew wages avoidable upon abandonment; finding that operating losses on the line are undisputed; stating that the line is in need of extensive rehabilitation; determining opportunity costs; and unfairly treating the shipping public.

We disagree with all of the appellants' allegations. The review board went into great detail to explain why it was proper for ICG to exclude its Lincoln traffic from its calculation of avoidable loss. We are in complete agreement with the board on this issue. Similarly, the review board followed the usual Commission policy that the overall earnings of a particular carrier are not relevant where, as here, there is uncontroverted evidence of losses on the line proposed for abandonment. Commission policy was also followed by the board in determining opportunity costs and determining crew costs to be avoidable. Moreover, the record substantiates the determination as to the need for rehabilitation of the line. The board properly balanced the interests of the shipping public and the applicant in reaching its determination.

In summary, the review board's decision properly considered all the evidence and made the proper conclusions from that evidence. There was no material error. Nor is there an issue of general transportation importance involved here because the board's conclusions are based on long-standing Commission precedent.

It is ordered:

1. This appeal will not be heard.

2. This decision is effective upon service.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Chairman Taylor was absent and did not participate. Commissioner Gradison did not participate.

Agatha L. Mergenovich
Secretary

(SEAL)

APPENDIX F

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-43 (Sub-No. 84)

ILLINOIS CENTRAL GULF RAILROAD COMPANY – ABANDONMENT – BETWEEN CLINTON AND LINCOLN, IL, AND BETWEEN LINCOLN AND NEW HOLLAND, IL

Decided: August 18, 1982

By petition jointly filed on August 11, 1982, the People of the State of Illinois (represented by the State Attorney General,[1] Illinois Commerce Commission, Bernard Sirotta Company Inc., and Patrick W. Simmons (Illinois Legislative Director for the United Transportation Union) (petitioners), seek to stay the effective date of the certificate and decision in this proceeding, pending judicial review. The certificate and decision was served July 21, 1982, and is to take effect on August 20, 1982.

A review of petitioners' arguments leads me to conclude that they have not presented justification for a stay in conformity with the criteria for granting stay requests delineated in *Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

First of all, I do not find that petitioners have presented a substantial case, and therefore, they are not likely to prevail before the court. In our decision of June 30, 1982,

[1]The State Attorney General is also representing two specific protestants, Hallsville Elevator Company and Mt. Pulaski Products, Inc.

in this proceeding we stated our agreement with the prior position of the review board. I find that our decision is defensible.

The Commission continues to adhere to the policy that the overall earnings of a carrier are not relevant in an abandonment proceeding where, as here, it has been established that there have been losses on the line in question. The carrier has experienced a steady decline in traffic on this line in recent years, and it incurred corresponding operating losses in the years 1979 through 1981.

Petitioners take exception to our policy of precluding motions to strike evidence submitted in investigated abandonment proceedings handled pursuant to the modified procedure [see 49 CFR 1121.36(d)(6)(ii)]. This policy is necessary because of the short time allowed to complete investigations in these proceedings. These time frames were established in The Staggers Rail Act of 1980, Pub. L. 96-448. Although we do not entertain such motions, we will not hesitate to strike improper material on our own motion. *Abandonment of R. Lines & Discontinuance of Serv.*, 365 I.C.C. 249, 253 (1981).

Contrary to petitioners' assertions, we have consistently held that crew costs are considered as avoidable in these proceedings. As we indicated in our prior decision, the board properly found crew costs to be avoidable, notwithstanding applicability of the "tabulated local rule" on this line. This rule generally requires a certain number of crews to be used on a line despite the levels of service. Members of such crews, however, will at some point in time accept reassignment, retire, or eventually die, thereby ending the carriers financial obligations. In such circumstances, these costs are indeed avoidable. See Docket No. AB-43 (Sub-No. 74F), *Illinois Central Gulf Railroad*

Company-Abandonment-In Henderson, Union, Webster, Crittenden and Caldwell Counties, KY (not printed), served March 1, 1982. I continue to believe this policy is sound.

In all other respects, including consideration of the need for rehabilitation of this line and the determination of applicable opportunity costs, the underlying decision is in keeping with current Commission policy and practice.

Petitioners also allege that a denial of a stay would work a real hardship on the shipping public. No shippers, however, presented specific data to support their allegations that they will be adversely affected by this abandonment. One shipper has used alternative motor carrier service previously. Moreover, as the board stated, all ICG stations on this line are located within approximately 7 miles of alternative rail facilities. This factor, coupled with the availability of several motor carriers and an existing highway system, supports the determination that shippers in the area will not suffer irreparable harm.

On the other side of the balance, as alluded to above, applicant will in all probability continue to incur losses on this line. Continued operation of the line would subject applicant to a continued opportunity cost of at least $175,143 per year.

In conclusion, I find that it would be contrary to the public interest to require the applicant to continue operations over the line until judicial review is completed.

It is ordered:

1. The petition for stay is denied.

2. This decision shall become effective on the date it is served.

By the Commission, Reginald E. Gilliam, Jr., Acting Chairman.

Seal

Agatha L. Mergenovich
Secretary

Office-Supreme Court, U.S.
FILED
MAR 24 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1222

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ILLINOIS, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the proper standard in denying petitioners' request for an interlocutory injunction pending review of the Interstate Commerce Commission's decision to permit abandonment of a rail line.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a) and the opinions of the Interstate Commerce Commission (Pet. App. 7a-22a, 23a-25a, 26a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4a) denying petitioners' motion for an interlocutory injunction was entered on September 21, 1982. A petition for rehearing (Pet. App. 5a) was denied on December 6, 1982. The petition for a writ of certiorari was filed on January 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Illinois Central Gulf Railroad Company (ICG) filed an application with the Interstate Commerce Commission for authority to abandon approximately 31 miles of rail line in Illinois. The Commission granted the application, noting that ICG had lost large sums of money from operations on the line due to declining traffic, that ICG would have to spend a large sum to rehabilitate the line, that the abandonment would not have a significant adverse effect on shippers, and that there is alternative transportation available in the area (Pet. App. 10a-14a, 18a). The Commission declined to hear administrative appeals from its decision (*id.* at 23a-25a), and petitioners sought review in the court of appeals.

Petitioners requested that the Commission stay the authorization to abandon the line pending judicial review, but the Commission denied that request (Pet. App. 26a-29a). The court of appeals also denied petitioners' subsequent requests for an interlocutory injunction against issuance of the authorization of abandonment (*id.* at 3a-4a) and for rehearing (*id.* at 5a-6a). The court stated that petitioners had failed to satisfy the standards for an interlocutory injunction set forth in *Adams* v. *Walker*, 488 F.2d 1064 (7th Cir. 1973), and *Ciechon* v. *City of Chicago*, 634 F.2d 1055 (7th Cir. 1980) (Pet. App. 2a, 6a). ICG discontinued operations over the line in August 1982 (Pet. App. 2a).

ARGUMENT

1. Petitioners contend (Pet. 7-10) that the court of appeals applied the wrong standard in denying their application for a preliminary injunction and that the decisions upon which the court relied are inconsistent with *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Petitioners' contentions are without merit.

To obtain a stay, a moving party must make the four-part showing first enunciated in *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Under that test, the movant must show (1) that there is a strong likelihood that it will prevail on the merits; (2) that it will suffer irreparable harm if the stay is not granted; (3) that other parties will not be harmed substantially by a stay; and (4) that the public interest supports the granting of the requested relief. Whether to stay an administrative agency action is an exercise of judicial discretion even where irreparable injury is shown. *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 10-11 (1942). Thus, the propriety of a stay is dependent upon the facts and circumstances of each case. *Ibid.*; *Yakus* v. *United States*, 321 U.S. 414 (1944).

The court of appeals relied upon its own precedents—namely, *Adams* v. *Walker*, 488 F.2d 1064 (7th Cir. 1973), and *Ciechon* v. *City of Chicago*, 634 F.2d 1055 (7th Cir. 1980)—in denying petitioners' motion for an interlocutory injunction and their petition for rehearing. These cases, which, as petitioners acknowledge (Pet. 10), follow *Virginia Petroleum Jobbers*, are consistent with *Holiday Tours*. In *Holiday Tours*, the court found that "a substantial case on the merits" rather than "a mathematical probability" of success may suffice for issuance of a preliminary injunction when all the other relevant factors weigh heavily in favor of the movant (559 F.2d at 843). The court stated (*ibid.*):

> [W]e hold that under *Virginia Petroleum Jobbers* a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a

> mathematical probability and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.

Contrary to petitioners' contention, *Holiday Tours* did not abandon the *Virginia Petroleum Jobbers* standard but merely explained the proper application of that test in those instances in which the balance of equities strongly favors a stay. In subsequent cases, the same court has repeatedly reaffirmed its adherence to *Virginia Petroleum Jobbers*. See, *e.g.*, *Ambach* v. *Bell*, 686 F.2d 974, 975 (D.C. Cir. 1982); *National Ass'n of Farmworkers* v. *Marshall*, 628 F.2d 604, 613 (D.C. Cir. 1980); *In re Permanent Surface Mining Regulation Litigation*, 617 F.2d 807 (D.C. Cir. 1980).

In any event, petitioners here not only failed to show "a mathematical probability" of success but, as the Commission found (Pet. App. 26a-29a), also failed to establish "a substantial case on the merits." The denial of a preliminary injunction was, therefore, clearly appropriate. Further, petitioners failed to demonstrate that the other factors weighed strongly in favor of a preliminary injunction, so that relief would in any event have been inappropriate under *Holiday Tours*.

2. Petitioners also contend (Pet. 11-13) that permitting the abandonment to occur in this case will preclude meaningful judicial review. This argument is grounded upon generalizations and not the particular facts and circumstances of this case.[1]

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[1]Petitioners rely on *Baltimore & O.R.R.* v. *United States*, 386 U.S. 372 (1967), for the proposition that denial of a preliminary injunction terminates judicial review as a practical matter. In *Baltimore & O.R.R.*

For example, petitioners argue (Pet. 11; emphasis added) that an abandonment is "*normally* * * * irreversible." But they do not dispute the fact that here the Commission may order reinstitution of service if necessary, since the track and roadbed are being preserved pending judicial review (Pet. App. 2a). Petitioners contend (Pet. 12) that preservation of the roadbed and track will not maintain the status quo because the cessation of service will have an adverse effect on shippers and communities previously served by the line. Petitioners overlook the Commission's finding (Pet. App. 13a-14a) that such adverse effects will be minimal because of the availability of alternative forms of transportation. In addition, petitioners have failed to demonstrate that any adverse effects could not be remedied by reinstitution of service if they prevail in their petition for review.[2]

Petitioners assert (Pet. 12) that denial of a stay pending appeal means that in all likelihood the case will be voluntarily dismissed. Petitioners' prediction that they themselves will voluntarily abandon their petition for review if they do

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the Court reversed the denial of an interlocutory injunction against a large railroad merger and held that the ICC had erred in permitting consummation of the merger without awaiting the determination of proceedings concerning certain railroads that would be affected. In that case, unlike this one, therefore, the question was whether the Commission's decision should await the disposition of on-going proceedings. Further, undoing a complex railroad merger is not comparable to the problem of resuming service on a line the roadbed and track of which have been maintained.

[2]Petitioners rely (Pet. 12) upon *ICC* v. *Maine Central R.R.*, 505 F.2d 590 (2d Cir. 1974), and *ICC* v. *Chicago, R.I. & P.R.R.*, 501 F.2d 908 (8th Cir. 1974), cert. denied, 420 U.S. 972 (1975), for the sweeping proposition that "abandonment of service should be subject to immediate injunctive action because of the adverse effect upon shippers and communities" (Pet. 12). However, those cases concerned illegal abandonments carried out without the Commission's authorization.

not have their way in this proceeding is not, we submit, a persuasive reason for issuing a stay or injunction pending judicial review.[3]

Petitioners argue (Pet. 12) that they have no remedy other than injunctive relief because they are not entitled to damages. This argument is irrelevant because the decision below merely denied an interlocutory, not a permanent, injunction. Finally, petitioners maintain (*id.* at 12) that preservation of roadbed and track "may not prevent the reverter of land." But they fail to show that this is likely to occur here.

If petitioners' arguments were accepted, the courts of appeals would have to stay all abandonments pending judicial review, regardless of the degree of injury. Such a rigid requirement would be inconsistent with the well-settled rule that a party is not ordinarily granted a stay without a showing of irreparable injury. *Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968). Moreover, petitioners' position is at odds with the broad judicial discretion inherent in the decision whether to grant equitable relief. *Id.* at 773-774.

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[3]Furthermore, in cases such as this, a stay is not always a necessary incentive for prosecuting of an appeal. For example, petitioners acknowledge (Pet. 12) two abandonment cases in which briefs were filed even though a stay was denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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